APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

81-1357

FILED APRIL 19, 1982
A. Daniel Fusaro, Clerk

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of April, one thousand nine hundred and eighty-two.

Present:

Hon. J. Edward Lumbard,
Hon. James L. Oakes,
Circuit Judges.
Hon. Daniel M. Friedman,
Chief Judge, Court of Claims.*

United States of America,

Appellee,

v.

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* Sitting by designation.

Opinion of the Court of Appeals for the Second Circuit

Ralph Frederick Nunziata,

Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Ralph Nunziata appeals from a judgment of conviction and a sentence entered in the United States District Court for the Eastern District of New York, Henry Bramwell, Judge, following his plea of guilty to Count Six of a fifteen-count indictment. Count Six charged appellant with transporting an unregistered firearm, "to wit: a M-16 lower receiver," in interstate commerce in violation of 26 U.S.C. §§5261(j), 5871; 18 U.S.C. §2. After the court sentenced appellant to six years' imprisonment, appellant moved to withdraw his guilty plea and to renew a previously denied speedy-trial motion. On this appeal appellant challenges his sentence and the denial of his motion. We dismiss the appeal from the denial of appellant's speedy-trial motion and affirm the sentence and the denial of appellant's motion to withdraw his plea.

The appeal from the denial of appellant's speedy-trial motion must be dismissed because by pleading guilty he waived his right to appeal. "A plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975) (quoting *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965)). A speedy-trial deprivation, whether statutory or constitutional, is a nonjurisdictional defect. *See United States v. Doyle*, 348 F.2d at 719. *See also United States v. Mann*, 451 F.2d 346 (2d Cir. 1971) (per curiam).

Opinion of the Court of Appeals for the Second Circuit

The Second Circuit has provided defendants with some leeway by allowing trial courts to accept conditional guilty pleas. *See generally* Note, *Conditional Guilty Pleas,* 93 Harv. L. Rev. 564 (1980). In this court, as in the District of Columbia and Eighth Circuits, a plea is conditional and thereby preserves the defendant's right to appeal only if the defendant has secured the consent of the court and the Government. *See United States v. DePoli,* 628 F.2d 779, 781 & n.1 (2d Cir. 1980) (noting that in the Third Circuit the Government's consent is not required; in the Fourth, Fifth, Sixth, and Ninth Circuits conditional pleas are not permitted; and in the other circuits the law is uncertain). *See also United States v. Price,* 599 F.2d 494, 496 n.1 (2d Cir. 1979); *United States v. Rothberg,* 480 F.2d 534 (2d Cir.), *cert. denied,* 414 U.S. 856 (1973).

In the absence of court and Government approval, a plea is not conditional and operates as a waiver of nonjurisdictional defects. *See United States v. Mann,* 451 F.2d at 347 ("neither the trial judge nor the prosecutor gave any consent whatever"). It is true that this court has occasionally departed from the strict rule stated in *Mann* that "[t]he consents . . . be clearly stated in writing or on the trial record." *Id. See, e.g., United States v. Rico,* 594 F.2d 320, 321 n.1 (2d Cir. 1979) (Government agreed and court "did not object, but expressed no view"; held plea was conditional); *United States v. Burke,* 517 F.2d at 379 (court approved reservation and prosecutor said nothing; held this was implicit assent so plea was conditional). In those cases, however, the defendants expressly reserved their right to appeal from a particular ruling and the question was the effect of the prosecutor's or court's conduct.

In the instant case, by contrast, appellant pleaded guilty immediately following the denial of his speedy-trial motion, but without ever raising the possibility of an appeal from that denial. In the absence of even an attempt to condition his plea on a

reservation of his right to appeal, much less a receipt of court and Government approval of such a strategy, appellant waived his right to appeal. *United States v. Reincke,* 383 F.2d 129, 131-32 (2d Cir. 1967), on which appellant relies, is inapposite. In *Reincke* the defendant successfully claimed he had been denied effective assistance of counsel because his counsel had failed to move to set aside the jury's verdict or to perfect an appeal, even though counsel knew an appeal was meritorious (the evidence against the defendant was insufficient), and the defendant had asked him to appeal. This is far different from the situation here. Nunziata's counsel did err regarding the dates relevant to the speedy-trial motion,* but he also obtained an advantageous plea bargain for his client, whose principal complaint is with the unexpected severity of his sentence.

Appellant's contention that the court below abused its discretion in denying his motion to withdraw his plea is without merit. During his allocution appellant admitted to transporting "the rear half of a demilitarized M-16 Receiver, or a part of it." He also admitted in general terms to doing the acts charged in Count Six, and agreed with the Government's summary of its case. At the time of sentencing appellant reaffirmed his guilt, both personally and through his attorney. In short, there was a factual basis for the plea even if the above-quoted language constituted a variance from the language of the indictment, and the court's refusal to permit withdrawal of the plea, after sentence

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* Although we do not reach the merits, we note that it is far from clear that counsel's error caused the court to reach an erroneous result. *See, e.g., United States v. Simonetti,* No. 81-00342 (S.D.N.Y. Aug. 21, 1981) (a defendant's remedy for failure to indict within thirty days was to seek dismissal of the complaint; having failed to do so before the complaint was dismissed without prejudice, further sanctions were held unavailable).

had been imposed, was not an abuse of discretion. Appellant's claim that a jury should have an opportunity to decide whether the weapon he described is a firearm is also without merit, because this defense was waived by the plea. *See LaMagna v. United States,* 646 F.2d 775 (2d Cir. 1981).

Appellant also contends that the sentence was excessive, in abuse of the court's discretion and in violation of the Eighth Amendment. This point borders on the frivolous. While the six-year sentence clearly exceeded what the defendant had hoped for, it was within the statute's ten-year limitation. Moreover, the court did not rely on improper factors or incorrect information in imposing sentence. Accordingly, the sentence is not subject to appellate review. *See United States v. Tucker,* 404 U.S. 443 (1972); *United States v. Hutcher,* 622 F.2d 1083, 1089 (2d Cir.), *cert. denied,* 449 U.S. 875 (1980).

Judgment affirmed.

s/ J. Edward Lumbard
s/ James L. Oakes
Circuit Judges

s/ Daniel M. Friedman
Chief Judge,
Court of Claims.

OPINIONS OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

UNITED STATES OF AMERICA

- against -

RALPH F. NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

June 23, 1981
2:00 P.M.

B E F O R E :

THE HONORABLE HENRY BRAMWELL, U.S.D.J.

COURT CLERK: United States against Ralph Nunziata.

THE COURT: The first thing I will do on this pending motion to dismiss the Indictment for failure to prosecute and, following the requirements of the Speedy Trial Act and timetable, I will put on the record a disposition of that motion.

The defendant Ralph Nunziata has moved, pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, to dismiss the

within Indictment for failure to comply with the Speedy Trial Act, 18 USC, Section 3161.

This motion was originally scheduled to be heard on Friday, June 26th, but, upon the request of the parties, I will render my decision today.

Mr. Nunziata was first arrested on a complaint on August 1, 1980. The Government, thereafter, dismissed that complaint on September 1, 1980.

Mr. Nunziata was later indicted on May 14, 1981, and arraigned on May 22, 1981.

It is the defendant's position that he was the subject of Government investigation for many months prior to his arrest in August of 1980, and that the Government had ample opportunity to bring an indictment within six months of his arrest.

Section 3161 D(1) of Title 18 provides in pertinent part:

If any charge contained in the complaint filed against an individual is dismissed, or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense, or offense based on the same conduct or arising from the same criminal episode, the provisions of Subsections B and C of this Section shall be applicable with respect to such subsequent complaint, indictment, or information.

Section 3161(b) of the Speedy Trial Act provides:

Any information or indictment charging and individual with the commission of an offense shall be filed within thirty days

from the date on which such individual is arrested or served with a summons.

Section 3161(c)(1) also mandates that a trial be commenced within seventy days of the filing of the indictment.

With this statutory background in mind, I would now turn to Mr. Nunziata's motion. The defendant was arrested on August 1, 1980, after which the Government had thirty days to obtain an indictment. Instead of doing so, they dismissed the complaint on September 1st, thus satisfying the thirty-day requirement of Section 3161(b).

Once the complaint was dismissed, the provisions of the Speedy Trial Act were told, because no charges were pending against the defendant.

As the Second Circuit noted in *United States v. Hillgas,* at 578 F.2d 453, the Speedy Trial Act was not intended to impose time limits in addition to those provided for by the Constitution with respect to Government investigations undertaken while the defendant is now the subject of normal proceedings.

In the instant case, therefore, Mr. Nunziata's contention that the Government took too long in its investigation of him is without merit.

In this connection, the defendant's reliance on *United States v. Taylor* is misplaced, since that case addressed the question of timely arraignment and no question has been raised concerning Mr. Nunziata's arraignment on this motion.

Accordingly, the defendant's motion to dismiss for failure to comply with the Speedy Trial Act is denied.

It is so ordered.

Opinions of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 CR 00298

UNITED STATES OF AMERICA

Plaintiff,

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

October 5, 1981
9:30 A.M. o' clock

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: Mr. Giulini, I've considered the motion, the papers. I'll put my position on the record.

The defendant Ralph Nunziata moves this Court this morning for an order permitting him to reargue a speedy trial motion which was denied by this Court on June 23rd, 1981. In the decision I rendered from the bench: After review of the defendant supporting affidavit, memorandum of law, after hearing counsel

this morning, I am constrained to deny the motion once again for the reasons I set forth in my decision of June 23rd, 1981.

In addition, I also note the defendant failed to raise a timely objection to the previous speedy trial determination.

Opinions of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 CR 00298

UNITED STATES OF AMERICA

Plaintiff

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

October 5, 1981
9:30 A.M. o'clock

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: I'll put the Court's position on the record.

Defendant Ralph Nunziata has also moved this Court for an order permitting him to withdraw his plea and judgment of conviction pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. The Rule provides that after sentence on the judgment of conviction a defendant may be permitted to withdraw his plea

of guilty if he can demonstrate to the satisfaction of the Court that the failure to do so will result in manifest injustice. The most recent controlling case in this Circuit interpreting the post-sentence aspect of Rule 32(d) is United States against Tiller, 602 Fed. 2d 30. The case instructs us that a defendant in Mr. Nunziata's position must shoulder a considerable burden in demonstrating that his plea, conviction and sentence meet the manifest injustice standard enunciated by the Rule. There is also some indication in Tiller that this burden entails an assertion of defendant's innocence to the satisfaction of the Court, but this requirement is not in this Court's view an absolute prerequisite to withdrawal of the plea providing defendant can show facts and circumstances warranting a favorable exercise of the Court's discretion under the Rule.

Mr. Nunziata, in his application to this Court, relies quite heavily on an alleged variance in the substance of Count Six of the indictment and that to which he plead guilty in full satisfaction of the charges against him on June 23rd, 1981. More specifically, he points to Count Six which charges the unauthorized shipment in interstate commerce of, and I quote "An M-16 lower receiver." And his admission before this Court on June 23rd, 1981 that he shipped, and again I quote, "The rear half of a demilitarized M-16 receiver as being fatally inconsistent with each other.

Moreover, he asserts that the unlawful character of his conduct did not become apparent to him until after June 20, 1979 at such time as the Bureau of Alcohol, Tobacco and Firearms advised him of the status of the instrument under the National Firearms Act.

I can agree with neither of these contentions. Mr. Nunziata during the lengthy colloquy with this Court on June 23rd, 1981

was repeatedly advised in the clearest terms of the nature and consequences of his guilty plea. The record reveals not only did he admit his guilt in the clearest terms, but was given every conceivable opportunity to refute or modify the Government's description of the proof it would have offered at Mr. Nunziata's trial. He not only failed to object to the Government's proposed proof, but specifically affirmed it as being an accurate representation of what had happened.

Under these circumstances, this Court cannot and will not reopen the conviction and sentence. Even under the more lenient interpretation of the manifest injustice standard of Rule 32(d) suggested in United States against Tiller, Mr. Nunziata has failed to demonstrate anything at all which would warrant this Court in setting aside a plea entered into intelligently, knowingly and voluntarily during a solemn plea colloquy, during which the defendant was advised in the clearest terms of the consequences of his plea. Even were this Court to find that a variance exited between Count Six of the indictment and the charge which Mr. Nunziata pleaded, I would be constrained to deny Mr. Nunziata's motions for the reasons I have mentioned.

Accordingly, defendant's motion to set aside his conviction and sentence is denied in all respects. The defendant is ordered to surrender to the United States Marshal on the first floor of this building at 12:00 noon today.

JUDGMENT OF CONVICTION AND SENTENCE SPREAD ON THE RECORD

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

UNITED STATES OF AMERICA

- against -

RALPH F. NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

June 23, 1981
2:00 P.M.

B E F O R E :

THE HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: Having been advised of your constitutional rights, the nature of the charge against you and the consequences of your plea, how do you plead to Count 6 of the Indictment?

THE DEFENDANT: Guilty.

THE COURT: The Court finds there is a factual basis for the plea, and accepts the guilty plea to Count 6.

Judgment of Conviction and Sentence Spread on the Record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

(HB)

UNITED STATES OF AMERICA

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
223 Cadman Plaza East
Brooklyn, New York

September 11, 1981
10 o'clock a.m.

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: The Court has taken into consideration the fact that this defendant pleaded guilty.

The defendant was arrested by agents for unlawfully engaging in the business of manufacturing and dealing in fire-arms and ammunition over two and a half years.

Judgment of Conviction and Sentence Spread on the Record

He was allowed to plead to one of 15 counts. The defendant admits his guilt, but limits his involvement to the count to which he pleaded.

The defendant has been unemployed since March of 1980. Prior to that date, he had attended college for two and a half years.

His past work history shows five job changes in the seven year period. It seems apparent that the defendant was involved in illegal fire-arms activity for at least two and a half years.

The defendant received probation after conviction for possession of a weapon about seven years ago in the Supreme Court, Queens County.

It is adjudicated that the defendant is hereby committed to the custody of the Attorney General or his authoritied representative, for imprisonment for a period of six years.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., amend. V (in part):

> "No person shall be * * * deprived of life, liberty, or property, without due process of law, * * * *"

U.S. Const., amend. VI (in part):

> "In all criminal prosecutions the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Statutes Involved

18 U.S.C. §2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. §921(a)(3):

> "(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile

by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

18 U.S.C. §922(g)(1):

"It shall be unlawful for any person '(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;. . . .

* * *

to ship or transport any firearm or ammunition in interstate or foreign commerce."

18 U.S.C. §924(a):

"Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisonment not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

Constitutional Provisions and Statutes Involved

18 U.S.C. §3161(b):

"Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charge. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days."

18 U.S.C. §3161(c)(1):

"In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent."

18 U.S.C. §3161(d)(1):

"If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual

is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be."

18 U.S.C. §3162(a)(1):

"If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."

Constitutional Provisions and Statutes Involved

18 U.S.C. §5841:

"(a) The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, or transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request."

26 U.S.C. §5845(a)(6):

"For the purpose of this chapter—

(a) Firearm — the term 'firearm' means . . . (6) a machine gun;. . . ."

26 U.S.C. §5845(b):

"The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Constitutional Provisions and Statutes Involved

18 U.S.C. §5861(j):

"It shall be unlawful for any person —

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter;. . . ."

18 U.S.C. §5871:

"Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000.00, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine."

Rules

Fed. R. Crim. P. 11(c):

"Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding

against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

Fed. R. Crim. P. 11(d):

"The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions

between the attorney for the government and the defendant or his attorney."

Fed. R. Crim. P. 11(f):

"Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

Fed. R. Crim. P. 32(d):

"A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Fed. R. Crim P. 35(b):

"The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."